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No. 89-1412

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MELVYN KAUFMAN, 77 WATER STREET, INC., 77 WATER STREET ASSOCIATES, 127 JOHN STREET FEE ASSOCIATES, 127 JOHN STREET ASSOCIATES, 437 MADISON AVENUE FEE ASSOCIATES, and 437 MADISON AVENUE ASSOCIATES,

Petitioners,

-against-

THE CITY OF NEW YORK, THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, EDWARD I. KOCH, in his capacity as Mayor of the City of New York, HARVEY W. SCHULTZ, in his capacity as Commissioner of the Department of Environmental Protection, and CHARLES M. SMITH, JR., in his capacity as Commissioner of the Department of Buildings,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 23, 1990

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COUNTER-QUESTIONS PRESENTED

1. On this record and based on substantial precedent, did petitioners' complaint, challenging the facial constitutionality of the City of New York's asbestos removal laws, enacted to combat a serious public health and safety threat, state a claim for an unconstitutional taking, where the laws are tied to a voluntary decision by the building owners to do alteration or demolition work which disturbs "friable" asbestos, and where petitioners do not even allege that they are unable to make a profit, nonetheless, that they are deprived of any economically viable use of their property?

2. Does a controversy ripe for judicial review exist where petitioners, holders of fee or leasehold interests in three

commercial office buildings who assert claims of "future" costs and "future" lost rents of over $40,000,000 in their complaint, have an available variance process under Local Law No. 46 of 1988?

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The instant case concerns the efforts of petitioners Melvyn Kaufman et al.

("petitioners"), holders of fee or leasehold interests in three commercial office buildings in Manhattan, to challenge the facial constitutionality of laws and regulations enacted by respondents, the City of New York, et al. ("the City"),[1] governing the removal of asbestos in buildings for the public health and welfare. The laws apply only where the owners' voluntary decision to do renovation, alteration or demolition work will disturb "friable" asbestos, thus causing harmful asbestos to become airborne.

Petitioners' complaint alleges that: (1) they have incurred about $8,500,000 in asbestos abatement costs associated with their voluntary alteration and renovation

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[1]The named defendants-respondents are the City of New York, its Environmental Control Board, the former Mayor, and the former Commissioners of the Department of Environmental Protection and the Department of Buildings.

work and about $1,500,000 in lost rent; and (2) they "will continue to be injured" by "future" abatement costs of about $32,000,000 and "future" lost rents of about $8,500,000 (A35-A36, ¶¶35-37, Pet., p. 4, n.3). The complaint does not allege that petitioners have lost the economically viable use of their property, that they are unable to continue to operate these commercial office buildings for their intended use, nor even that they cannot make a profit. It also does not acknowledge that there is an available variance process as to the alleged "future" $40,000,000 loss.

Petitioners seek to have this Court review by way of certiorari an order and judgment of the United States Court of Appeals for the Second Circuit, entered December 8, 1989, which affirmed a judgment of the United States District Court for the Southern District of New York, entered May

26, 1989. Upon the City's motion, the District Court dismissed the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Petitioners' unsuccessful federal constitutional claim has two aspects: (1) a due process challenge, now nominally dropped in this Court; and (2) an unconstitutional taking claim. Neither deserves review.

Indeed, respondents are forced to set the record straight. This case is not novel in takings jurisprudence, but for petitioners' distortion of the governing statutory and regulatory scheme. Once that scheme is understood, it is clear that petitioners have not stated a claim for a taking without just compensation, given the controlling legal principles set forth by this Court, which are largely unacknowledged by petitioners.

1. The Statutory and Regulatory Scheme Governing Asbestos Removal

In the wake of increasing knowledge about the dangers of asbestos, once thought to be a "wonder material" and commonly used in building construction, the City of New York enacted a comprehensive regulatory scheme to protect the public health and safety. Environmental Encapsulating Corp. v. The City of New York, 855 F.2d 48, 50-52 (2d Cir., 1988).

". . . [B]efore the deadly hazards of asbestos were realized, more than half of the high-rise commercial buildings built in the City between 1958 and 1972 used asbestos as fireproofing," virtually every boiler room has it, and New York City buildings have an estimated 3.5 million tons of asbestos. Id. at 50. Prior to 1971, there were two methods approved by the New York City Board of Standards and Appeals for use in the City of New York for fireproofing of steel structural

members in building construction. One was certain approved asbestos products, often sprayed onto the steel members, and the other was cementitious materials, i.e., sprayed cement or concrete block. The choice of which method to use lay solely with the owner.

In 1972, in response to then identified public health hazards, the City completely banned the use of sprayed asbestos in building construction, effective February 1972. N.Y.C. Admin. Code, §24-146.

Thereafter, in December 1985, the City Council enacted Local Law No. 76 of 1985 ("Local Law 76") to address the public health hazards posed by voluntary alteration or demolition work in buildings containing asbestos and to regulate asbestos abatement activities. N.Y.C. Admin. Code, §§24-146.1

and 27-198.1.[2] In particular, many of the asbestos-containing materials already present in buildings are subject to crumbling or powdering when they are touched or otherwise disturbed, with the result that "friable" asbestos fibers become airborne. The "Declaration of Legislative Findings and Intent" for Local Law 76 states that (see, Environmental Encapsulating Corp., supra, 855 F.2d at 51):

> The council hereby finds that exposure to airborne asbestos fibers and particles in the air has been linked by reputable medical and scientific authorities to a significant increase in the incidence of diseases such as asbestosis, bronchogenic carcinoma, mesothelioma, and other malignancies and that substantial amounts of materials containing asbestos have been used in buildings for fireproofing, insulation, soundproofing,

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[2]In December 1986, the City Council enacted Local Law No. 80 of 1986, which amended certain provisions of Local Law 76, not at issue here.

decorative and other purposes. The council further finds that the predominant causes of asbestos becoming airborne are due to the performance of building renovation and demolition without adequate adherance [sic] to procedures for safeguarding workers and the general public, by persons who have not received adequate training in the handling of materials containing asbestos.

Therefore, it is the purpose of this local law to safeguard the public health by requiring that renovation or demolition projects which disturb asbestos be conducted in accordance with procedures established pursuant to the provisions of this local law and that workers who handled materials containing asbestos receive appropriate training [3](Emphasis added in Court opinion).

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[3]Without any basis, and completely ignoring this legislative declaration, petitioners attack Local Law 76 as "an arbitrary act of political expediency" and the City's actions as "cavalier" (Pet., pp. 4-5). Not only do petitioners ignore the fact that they themselves, their tenants and the public benefit from the removal of harmful "friable" asbestos in their voluntary renovation work, but the legislation is presumptively constitutional, and speculative, lurking or hidden legislative motivations do not come

(Footnote Continued)

Local Law 76 established an asbestos abatement program which requires that the presence and condition of asbestos be ascertained before any building alteration, renovation or demolition work is performed, and that the asbestos either be sealed in place or removed if the work would disturb

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(Footnote Continued)
into play (see A25, n.13). Once the Court makes the limited inquiry as to whether the law bears a rational relationship to the public health and welfare, it may not go beyond that to examine its wisdom or need. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979); Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 423 (1952).

In any event, the District Court recognized that Local Law 76 was passed in 1985, in part, as a result of increased knowledge and advances in science as to the health risks of asbestos (A14-A15); it is well-accepted that, based on continuing scientific and federal agency reviews in the 1980's, more developed risk assessments and studies served as the scientific basis for further regulations. Cf. Environmental Encapsulating Corp., supra, 835 F.2d at 50, and Record on Appeal therein, Affidavit of William H. Nicholson, Ph.D., dated May 4, 1987, also submitted as background in this case in the Joint Appendix below at JA50-JA51, JA55.

it and cause it to become airborne. Thus, before any such work, an applicant for a building permit must file either a certification that the work to be performed will not constitute an "asbestos project," or submit an "asbestos inspection report" which sets forth the condition of the building as to the presence and condition of asbestos. N.Y.C. Admin. Code, §27-198.1(a).[4] A certification that building work does not constitute an asbestos project must be

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[4]Local Law 76 defines "asbestos project" as any work in connection with the alteration, renovation, modification or demolition of a building which will disturb more than 260 linear feet or 160 square feet of "friable" asbestos containing material, or lesser amounts which the commissioner may establish by regulation. N.Y.C. Admin. Code, §24-146.1(a)(8). It defines "asbestos containing material" as asbestos or any material containing more than 1% asbestos by weight, and such material is defined as "friable" if it can be crumbled, pulverized or reduced to powder when dry, by hand pressure. N.Y.C. Admin. Code, §24-146.1(a)(4), (9).

prepared by an individual certified by DEP as having "satisfactorily demonstrated his or her ability to identify the presence and evaluate the condition of asbestos in a building and structure," i.e., an "asbestos investigator." N.Y.C. Admin. Code, §24-146.1(a)(3). The law requires that all asbestos abatement activities be conducted in accordance with approved safety procedures and be performed by persons with appropriate training and certification to minimize the threat to the public from asbestos removal.

The law does not require the sealing or removal of any asbestos which is not being disturbed or will not be disturbed by such work.

The asbestos abatement program is administered by the Department of Environmental Protection and its Commissioner (hereafter "DEP"), consistent

with its mandate "to preserve, protect and improve the air resources of the City so as to promote health, safety and welfare" and to prevent injury to human life. City Charter, §1403(c); N.Y.C. Admin. Code, §24-102. In response to Local Law 76's delegation to "establish ... procedures for the safeguarding of the health and safety of the public and all persons who work at or in the vicinity of an asbestos project", N.Y.C. Admin. Code, §24-146.1(c), DEP adopted rules and regulations governing asbestos abatement activities in March 1987, and later amended.[5] See DEP, Rules and Regulations

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[5]In addition, the alteration, renovation and demolition of buildings in New York City is subject by law to the regulation of the Department of Buildings. See N.Y.C. Charter, §§645(b)(1), (2). Aside from an owner's common law duty, an owner of a building is charged with the responsibility "at all times" for the safe maintenance of the building and its facilities. N.Y.C. Admin.
(Footnote Continued)

of the New York City Asbestos Control Program, §§8000-8405.

Notably, there are certain activities under the regulations which presumptively do not constitute alteration or renovation work involving "friable" asbestos material, including work on awnings, newsstands, parapet walls, fire escapes, and the replacement of exterior water tanks. For such activities, no notification is required unless "friable" asbestos material is discovered. Id., §§8101, 8152. However, where the alteration or renovation work will disturb "friable" asbestos material, the regulations require the filing of an asbestos

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(Footnote Continued)
Code, §27-128. Owners can be ordered to correct unsafe conditions on their property and to abate a public nuisance. N.Y.C. Admin. Code, §§26-115 et seq., 17-142 et seq.

inspection report, together with a specified filing fee. Id., §§8101, 8152.

With respect to the actual conduct of asbestos abatement work, the DEP Regulations specify approved procedures and technical standards for air sampling, monitoring and analysis (§8170 et seq.); materials and equipment (§8190 et seq.); workplace preparation, decontamination, and entry and exit procedures (§8210 et seq.); asbestos abatement procedures, (§8230 et seq.); and clean-up procedures (§8240 et seq.).[6]

In essence, these regulations require that the area where the abatement work is to be performed be isolated by means of plastic

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[6]In December 1986, DEP adopted Rules and Regulations Governing Training of Asbestos Handlers, Asbestos Handler Supervisors, and Asbestos Investigators. §§8110-8146; see Environmental Encapsulating Corp., supra, 855 F.2d at 51-52, 60-62.

barriers and the sealing or reverse pressurization of the heating, ventilation and air conditioning system; that the air be monitored for asbestos before, during and after the work; that decontamination facilities be installed and strict entry and exit procedures instituted to prevent the escape of asbestos from the work area on clothes or equipment; and that the asbestos be properly bagged for disposal or sealed in place. The regulations do not require that buildings in which asbestos abatement work is being performed be evacuated, except, of course, the area in which the work is being performed, and any areas which cannot be isolated from the work area.

Finally, in May 1988, Local Law No. 46 of 1988 ("Local Law 46") amended the Administrative Code to allow for individual variances from the requirements of Local Law 76 and the regulations for specific asbestos

projects. N.Y.C. Admin. Code, §24-146.1(i). Variances may be granted if adequate proof is presented that compliance with particular requirements related to asbestos removal or encapsulation would impose unreasonable hardship. Id. In granting a variance, such conditions "as the policies of [the Administrative] Code may require" may be imposed. Id., Local Law 46 at §7(i).[7]

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[7]Section 7 of Local Law 46 provides:

> [t]he commissioner [of the DEP] may grant individual variances for asbestos projects at specific sites, from particular requirements related to asbestos prescribed by this code and regulations or orders of the commissioner promulgated thereunder, whenever it is found, upon presentation of adequate proof, that compliance with such requirements would impose unreasonable hardship. In granting a variance the commissioner may impose such conditions as the policies of this
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> (Footnote Continued)

2. **The Litigation History and Opinions Below**

Petitioners filed a complaint against the City of New York, et al., on July 22, 1988 (A27-A43). They sought a judgment: (a) declaring Local Law 76 of 1985, as amended, and the corresponding regulations unconstitutional, null and void; (b) enjoining the City from enforcement; and (c) awarding damages representing their cost of compliance (A42-A43).

The first claim is the only federal constitutional claim (A36-A38, ¶41), with the others various state law claims including an estoppel claim. As noted, the federal claim

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(Footnote Continued)

> code may require and shall publish in the City Record no later than seven days after the granting of such variance a statement of the reasons leading to his or her decision.

N.Y.C. Admin. Code, §24-146.1(i). See also DEP Regulation §8102 (variance procedure).

has two aspects: (1) that the asbestos removal laws and regulations violate their due process rights; and (2) that they constitute a taking of property without just compensation.

Upon the City's motion, the United States District Court for the Southern District of New York (Ward, U.S.D.J.), granted the motion to dismiss the federal claim for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). It also dismissed the pendent state claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). See A5-A26; Kaufman v. The City of New York, 717 F. Supp. 84 (S.D.N.Y., 1989).

On appeal, the United States Court of Appeals for Second Circuit unanimously affirmed the judgment below (A1-A4; Kaufman v. The City of New York, 891 F.2d 446 (2d Cir., 1989) (per curiam)). Upon

review of all of the parties' contentions (A2-A4), the Court of Appeals affirmed "substantially for the reasons given" in the District Court's "careful and comprehensive opinion" (A4).

In brief, the taking claim was found meritless under recent and controlling precedent from this Court (A19-A25). Rejecting the physical occupation claim in light of the "narrow" ruling in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982), the courts recognized that Local Law 76 is a regulation on the use of property, which only applies if the owner seeks to use it in a manner which threatens to make asbestos airborne (A19-A21). Unlike Loretto, supra, and Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979), "Local Law 76 and the regulations clearly allows plaintiffs to maintain all their rights of control" over their property and "the

manner in which compliance with the law is achieved" (A22 & n.12). In sum (A22-A23):

> Despite [plaintiffs'] diligent attempts to characterize Local Law 76 as a physical invasion of their property, the law simply regulates the uses that they can make of the buildings, and does so in a rather narrow manner. The ability to renovate the buildings is conditioned on the protection of the public from the dangers associated with airborne asbestos. Plaintiffs are free to use the buildings without making alterations or to make alterations that do not present a public health hazard by causing asbestos to become airborne. If plaintiffs choose either of these alternatives, the strictures of Local Law 76 can be completely avoided. The extent of any alteration work to be performed, and therefore the extent of the cost of compliance with the law for any asbestos project, is solely left to the discretion of plaintiffs. Furthermore, plaintiffs continue to control the activities that occur in their buildings and remain able to supervise or dismiss the qualified individuals they voluntarily choose to retain to perform the asbestos removal work. It is plaintiffs who remain ultimately responsible for compliance with the requirements of Local Law 76. Their ownership

> rights in the property are not significantly diminished by the requirements of asbestos removal.

So too, under well-established precedent (see A23 and cases cited therein), there was no claim because ". . . valid zoning laws which prohibit an entire use of property result in more severe hardship on property owners than Local Law 76, which only adds to the cost of a specific use of property dangerous to the public, and leaves the final choice on how to use the property in the hands of the owner" (A24).

Furthermore, petitioners failed to allege a sufficient diminution in value or use of their buildings caused by Local Law 76 to state a claim, since there is no allegation that the buildings will be robbed of all economic use, ¶¶ 34-38, or that the law will force them to give up the general use of their property as office buildings, nor even that the operation of their buildings will be

unprofitable (A24, citing Keystone Bituminous Coal Association v. De Benedictis, 480 U.S. 470, 495-496 (1987)) ("petitioners have not claimed . . . the Act makes it commercially impracticable for them to continue mining . . . Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit").[8]

In sum, "Local Law 76 and the regulations impose additional costs on plaintiffs as incident to their ownership of property, but these costs are well within the

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[8]The District Court noted that petitioners are not required to seal off the entire building while asbestos is removed under the regulations, only those sections which will be affected by the alteration work (A24). Accordingly, those parts of the building not being renovated are fully available for their use and economic benefit and the buildings continue to be used as office buildings, "a reflection of [petitioners'] own determination that the benefits of continued operation outweigh the costs of compliance with Local Law 76" (A24-A25).

scope of the City's police powers. Accordingly, plaintiffs ... failed to state a constitutional takings claim" (A25).

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE CITY'S ASBESTOS REMOVAL LAWS AND REGULATIONS ARE A CONSTITUTIONAL EXERCISE OF ITS POLICE POWERS AND DO NOT CONSTITUTE AN UNCONSTITUTIONAL "TAKING" OF PETITIONERS' PROPERTY. ADDITIONALLY, THERE IS AN AVAILABLE VARIANCE PROCESS, MAKING THE CLAIM PREMATURE.

To succeed in their facial challenge to the constitutionality of the asbestos removal laws, petitioners had to show that "no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Petitioners failed to do so. Rather, based on ample precedent, particularly as to public health, safety and welfare regulations, see, e.g., Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), the

instant case does not warrant review. As shown below, petitioners do not establish: (1) any facts arising to the level of an unconstitutional taking or other claim; or (2) that their claim is ripe for review.

1. **The Valid Exercise of the Police Power**

Although petitioners nominally raise only a taking claim in this Court, their purported analysis of that claim makes clear that they once again challenge the City's exercise of its police powers (Pet., passim). Nonetheless, it is well-settled that economic and social welfare legislation satisfies due process if it is rationally related to a legitimate governmental objective. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

"A legitimate governmental purpose is, of course, one which furthers the public health, safety, morals or general welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Every statute is

entitled to "a strong presumption of constitutionality," Califano v. Aznavorian, 439 U.S. 170, 175 (1978); Mathews v. De Castro, 429 U.S. 181, 185 (1976), based on the principle that courts will "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy it expresses offends the public welfare." Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421, 423 (1952).

Plaintiffs maintain that because they constructed their buildings in accordance with applicable building regulations at a time when asbestos was one of two approved building materials, the costs of asbestos abatement cannot be imposed on them, but rightly lie with the City (A36-A38, ¶41(a), A42, ¶64). However, in the exercise of its police power to protect the public health, safety and welfare, the City can require property owners to comply with new safety

measures, even where such measures necessitate costly improvements on existing, lawfully constructed buildings.

The clearly legitimate governmental objective underlying the challenged Local Law 76 is the protection of the public from the serious health dangers, including asbestosis and carcinoma, posed by airborne asbestos. Environmental Encapsulating Corp., supra, 855 F.2d at 50-52; see ante, p. 6. Thus, the asbestos abatement program, as a land use regulation directly and reasonably related to the stated legislative purpose, is a "constitutionally valid use of [the] state's police power." Id. at 53. Cf. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within . . . police power"). Significantly, the complaint does not allege that asbestos

does not present a public health hazard, nor that asbestos abatement is not a proper subject of the City's police power. See also Railway Express Agency Inc. v. New York, 336 U.S. 106, 108-109 (1949).

While the challenged laws and regulations do impose certain obligations on building owners to ensure compliance with the law, such a requirement is unexceptional. As this Court held in Keystone, supra, 480 U.S. at 491-492 (1987):

> Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . These restrictions are "properly treated as part of the burden of common citizenship." . . . Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to

> the community...." (citations omitted).

See also Andrus v. Allard, 444 U.S. 51, 65 (1979), citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-128 (1978) (government regulation by definition involves the adjustment of rights for the public good; "often this adjustment curtails some potential for the use or economic exploitation of private property").

The leading case for the principle that even owners of lawfully constructed buildings can be compelled in the name of public safety to make improvements to their property, even at great expense, is Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946).

There, in upholding a challenge to the constitutionality of a New York law requiring that all lodging houses install an automatic wet sprinkler pipe system as a fire safety measure, despite compliance with all

applicable laws some four years earlier, this Court declared (id. at 81-83):

> Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. Protection of the safety of persons is one of the traditional uses of the police power of the States. ... It is for the legislature to decide what regulations are needed to reduce fire hazards to a minimum. Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. We are dealing here with a less drastic measure. But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. ... [A] statute may be sustained though some of the objects affected by it may be wholly innocent. The question of validity turns on the power of the legislature to deal with the prescribed class. That power plainly exists here. (emphasis added) (citations omitted).

Accord, Andrus v. Allard, 444 U.S. 51 (1979) (fact that artifacts were lawfully acquired does not preclude government from prohibiting their sale); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) ("A vested interest cannot be asserted against [the police power] because of conditions once existing").[9]

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[9] In a pertinent State case, McCallin v. Walsh, 64 A.D.2d 46 (1st Dept.), aff'd on opin. below sub nom. Kaufman v. O'Hagan, 46 N.Y.2d 808 (1978), plaintiff Melvyn Kaufman, one of the instant petitioners, challenged on constitutional and state law grounds virtually identical to the instant ones, a New York City law which required the installation of costly alarm, communication, elevator-recall and sprinkler/smoke-control systems, and the adoption of a fire safety plan in 870 existing office buildings, including those herein. Relying on Saxl, the New York Courts upheld the constitutionality of the local law, based on the "... well established principle that a legislature may, as a proper exercise of the police power, require building owners to make improvements essential to the reduction of fire hazards." Id., 64 A.D.2d at 59.

Try as they may to avoid these legal principles, the fact is that petitioners' claims rest on the fundamentally flawed premise that an owner's "reliance" on existing building codes gives rise to a vested right, which renders any subsequent safety requirements an unconstitutional taking without just compensation. They argue that the challenged laws and regulations are the "retroactive" imposition of an affirmative requirement that plaintiffs "rectify prior [City] mistakes" by removing asbestos originally installed at the City's "direction" (Pet., p. 3, 6-7). Simply put, while they may fancy themselves as having brought a "case of first impression" (Pet., p. 3), they improperly seek to bootstrap an equitable estoppel argument into a constitutional deprivation.

At the outset, notwithstanding their litany that the City's "directed" them to

install asbestos (Pet., passim), the fact is, of course, that the City never required the use of asbestos; it required fireproofing. To accomplish this public safety purpose, the City approved building materials containing the two widely-accepted and effective fireproofing technologies: cement and asbestos (A30, ¶18). Petitioners were free to use either material, based on their own assessment of relevant factors including relative utility and cost.

In any event, their attempt to insulate themselves from the above controlling principles of law through the subterfuge of unconstitutional "retroactivity" (Pet., pp. 6-15) must be rejected based on the above discussion and for all the reasons stated by the District Court (A15-A17).

Petitioners cannot even show that the laws are retroactive because obviously all new safety measures require the "undoing,"

to some degree, of prior lawful construction. See Saxl, supra. This Court cited Saxl with approval in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), stressing that it had consistently affirmed the State's broad power to regulate landlord-tenant relationships without paying for all ensuing economic injuries. Id. at 440. Thus the Loretto holding "in no way alters" the State's power to require compliance with building codes and to require provision of "smoke detectors, fire extinguishers and the like ...." Id.[10]

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[10] See also Oriental Boulevard Co. v. Heller, 27 N.Y.2d 212 (1970), app. dismissed, 401 U.S. 986 (1971) (law requiring installation of air pollution control equipment held constitutional); Tenement House Dept. of City of New York v. Moeschen, 179 N.Y. 325, 333-335 (1904), aff'd, 203 U.S. 583 (1906) (law requiring installation of individual water closets held constitutional, notwithstanding its application to existing building constructed in compliance with administrative order).

Whether the threat is from fire or asbestos, the principle is the same: even faultless property owners can be required to assume the burden of rectifying conditions on their premises which the legislature has determined jeopardize public health, safety or welfare. See A14, n.7 and Heckler v. Community Health Services, 467 U.S. 51, 60 (1984) (application of equitable estoppel against government only in very limited and unusual circumstances, for to do otherwise ". . . would frustrate the Government's ability to enforce the law and, in turn, undermine the public interest in full enforcement of the law").[11]

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[11] See also United States v. Boccanfuso, 882 F.2d 666 (2d Cir., 1989) (no estoppel from enforcement of Clean Water Act); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 734 (8th Cir., 1986), cert. denied, ___U.S.___, 108 S.Ct. 146 (1987) (retroactive application of

(Footnote Continued)

For all these reasons, petitioners do not state any type of due process claim and their attempts to constitutionalize an estoppel claim are baseless.

2. The Taking Claim

Turning to petitioners' direct challenge that the City's asbestos removal laws and regulations on their face are an unconstitutional taking of their property, there are two threshold obstacles they fail to overcome: (1) they have an available variance process (post, pp. 50-51), and (2) facial taking challenges are especially disfavored by this Court. Pennell v. City of San Jose, supra, 485 U.S. at 11-14; Keystone, supra, 480 U.S. at 494. In any

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(Footnote Continued)
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9607, for the legitimate legislative purpose of cleanup of abandoned hazardous waste does not violate due process nor constitute an unconstitutional taking).

event, the laws in no way appropriate their property for the use of any governmental authority or agency or otherwise result in a permanent physical occupation. Petitioners, who do not even attempt to argue that the law does not advance a substantial government interest, fail to meet the heavy burden of showing that the "mere enactment" of the law has deprived them of all beneficial, economically viable use of the property.

Regardless of petitioners' unsupported argument (Pet., pp. 6-14), this Court draws a clear distinction between "a permanent physical occupation" and a "regulation that merely restricts the use of property." Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at 430. Compare Penn Central Transportation Co. v. New York City, 438 U.S. 104, reh. denied, 439 U.S. 883 (1978). The distinction involves

the difference between an "actual ... invasion of the land, amounting to an appropriation of, and not merely an injury to, the property" (Loretto, supra, 458 U.S. at 428), and an interference with property that "arises from some public program adjusting the benefits and burdens of economic life to promote the common good" (Penn Central, supra, 438 U.S. at 124).

A. Physical Taking Claim

Petitioners do not fall within the "very narrow" holding of Loretto, 458 U.S. at 441, since there is no permanent physical occupation. See F.C.C. v. Florida Power Corp., 480 U.S. 245, 251 (1987). Here, Local Law 76 and the DEP regulations, on their face, do not require the appropriation of private property for City or public occupancy. Rather, they are plainly regulatory in nature. Any interference with petitioners' property arises from the

Legislature's determination that the benefit a building owner derives from the ability to alter or demolish his property must be balanced with the burden of ensuring that the public health, safety and welfare is not jeopardized thereby by exposure to airborne asbestos. Cf. Keystone, supra, 480 U.S. at 470, 476-477, 488 n.18 (1987); Mugler v. Kansas, 123 U.S. 623, 665, 668-670 (1887).

Despite the clear statutory language, petitioners continue to make the false assertion that the City's asbestos laws and regulations "affirmatively require" them "to seal off and close portions of their buildings", thus allegedly showing that there is government-mandated "physical interference with [their] buildings" (Pet., p. 12). Try as they will to confuse the issue, the distinction between a regulatory impact and a physical taking is clear. It is obvious from the case law that it may be

necessary temporarily or even permanently to close off part of a building to carry out the alterations required to comply with new safety measures, but such laws do not interfere with private ownership and control, and any work that is done is performed under the owner's direction.

In addressing a far closer question, this Court held that a law that permanently closed 50% of the plaintiff's subsurface land to mining beneath protected buildings and land as a means of providing surface support "of course" involved "land use regulation, not a physical appropriation of ... property." Keystone, supra, 480 U.S. 489, n.18. While petitioners do not acknowledge Keystone at all, even the dissenting opinion therein provides two key distinctions from the instant case: (1) there is an undisputed "discrete and narrow" purpose here to promote public health and safety; and (2)

there is no "complete extinction" or "destruction" of petitioner's property. Id., 480 U.S. at 513.

Petitioners disingenuously try to come under Loretto's "permanent physical occupation" standard, without even acknowledging that they asserted below that the alleged taking "to date" was "temporary" (Pl.-App. br., 2d Circuit, 8/14/89, p. 18). So too, their reliance on Kaiser Aetna v. United States, 444 U.S. 164 (1979) (Pet., pp. 6, 9, 12-13) is misplaced. Kaiser Aetna, as Loretto, is easily distinguished as involving actual physical appropriations of property, i.e., the requirement that the property owner open his marina to the public, and this Court expressly rejected the argument that the government could be "estopped" by official consent. Id. at 179-180. Here, the City has in no way physically invaded petitioners' property by

depriving them of their "right to exclude" the public from their premises, the "fundamental element" of property ownership emphasized by this Court. Id., 444 U.S. at 179-180.

Finally, petitioners' "confiscatory" taking cases (Pet., pp. 9-10) are inapposite, and evidence no conflict with this case. First, those cases involve the issuance and revocation of permits and rezoning only, and not the unquestioned government power to regulate building codes and require compliance with new safety laws. Further, they still require a showing of "onerous" regulation, either by deprivation of economically viable use, or by actual appropriation by government title or occupation. Neither showing is made here.

B. **Regulatory Taking Claim**

The law is clear that a land use or zoning statute "does not effect a taking if it

'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987), quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980). Accord, Keystone, supra, 480 U.S. at 485. As set forth above, ante, pp. 24-35, the City's asbestos laws and regulations constitute a lawful exercise of the City's police power and substantially advance the public health, safety and welfare.

The Fifth Amendment, applied to the States through the Fourteenth Amendment (Penn Central, supra, 438 U.S. at 122), is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). Nevertheless, "Government could hardly go

on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

Here, even if, arguendo, petitioners were unable to earn a reasonable rate of return, there would still be no unconstitutional taking in this case, given the overriding and critical legislative purpose to protect the health and safety of citizens. See Saxl, supra; Loretto, supra, ante, pp. 28-33.

In the land use area, this Court "uniformly reject[s] the proposition that diminution in property value, standing alone, can establish a taking." Penn Central, supra, 438 U.S. at 133. This is true even where the challenged regulation prohibits the most profitable or beneficial use of the property. Id. at 124-125. See also

Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962) (ban on using gravel pit as quarry). Indeed, this Court "has repeatedly upheld regulations that destroy . . . real property interests" and has never required the courts to calculate whether a specific individual has suffered burdens in excess of benefits received. Keystone, supra, 480 U.S. at 488 n.18 and 491 n.21. See also Andrus v. Allard, 444 U.S. 51 (1979); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

In evaluating the economic impact of a government regulation on a particular property, one must look to the property as a whole (Keystone, supra, 480 U.S. at 497, quoting, Penn Central, supra, 438 U.S. at 130-131). Only where the economic impact of a government regulation so adversely affects an owner's property rights or so interferes

with distinct "investment-backed expectations" that an owner is deprived of any "economically viable use of his land", can there be said to be a taking. Keystone, supra, 480 U.S. at 495, 499. See Penn Central, supra, 438 U.S. at 127-128. In fact, reductions of values of more than 90% have been held constitutional.[12]

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[12]The courts have repeatedly sustained government regulations which have caused radical reductions in property values. See, e.g., Village of Euclid, supra (75% reduction in property value); Hadacheck v. Sebastian, supra (92.5% reduction in property value, from $800,000 to $60,000); Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir., 1984), cert. denied, sub nom. 40 Eastco v. City of New York, 470 U.S. 1087 (1985) (developer's profit expectations may be frustrated); William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir., 1979), cert. denied, 445 U.S. 928, reh. denied, 446 U.S. 929 (1980) (95% reduction in property value, from $2,000,000 to $100,000).

Accordingly, the lesser, but still substantial, reductions in property values resulting from laws requiring building

(Footnote Continued)

In light of the case law, it is clear that the instant complaint fails to state a claim. It does not allege that their properties as a whole have been rendered valueless by the City's asbestos laws and regulations, but merely that the value of their properties has been "substantially impair[ed] and diminish[ed]" because of the costs and obligations of asbestos abatement (A37). Such allegations are insufficient because they do not establish that petitioners have been deprived of economically viable use of their property.

(Footnote Continued)
owners to comply with new public health and safety measures have certainly not been found to constitute a taking. Queenside Hills Realty Co. v. Saxl, supra (cost of compliance equalling 30% of full market value of property); Tenement House Dept. of City of New York v. Moeschen, 179 N.Y. 325 (1904), aff'd, 203 U.S. 583 (1906) (cost of compliance equalling approximately 10% of property value).

Significantly, petitioners nowhere claim that they can no longer profitably operate their buildings for office space or otherwise. Absent such allegations, the complaint literally fails to state a claim "[b]ecause [the] test for regulatory takings requires [the court] to compare the value that has been taken from the property with the value that remains in the property...." Keystone, supra, 480 U.S. at 495, 497 (plaintiffs' burden of proving taking "especially steep" where they failed to claim that their mining operations, or any specific mine, had been unprofitable since the passage of the challenged law).

With respect to interference with any "distinct investment-backed expectations" (Pet., p. 11), it is clear that petitioners were, and are, not entitled to expect that their property could be operated indefinitely independent of future public health and

safety requirements. See, ante, pp. 24-35. Moreover, the City's asbestos removal laws and regulations do not prohibit what must be regarded as their primary expectation regarding the use of the property: the use of their buildings for office space. See Penn Central, supra, 438 U.S. at 136.

Unlike government regulations which prevent property from being used for its intended or desired purpose, the challenged laws and regulations merely condition their ability to alter portions of their buildings in compliance with certain public health and safety measures. Petitioners have it within their power to entirely avoid the costs and obligations associated with asbestos abatement, by foregoing any alteration work which would disturb "friable" asbestos. While painting and new carpeting alone might bring a less favorable rental than a complete renovation, it is clear that the City's

asbestos laws and regulations have not deprived these Manhattan office properties of any economically viable use.

In sum, petitioners have not and cannot meet their burden of showing that their property has been deprived of any economically viable use. At the most, they have alleged a "mere diminution" in their property value, which cannot establish a taking. Penn Central, supra. Petitioners have not been prevented from continuing to use their properties for their intended purpose -- office buildings -- much less been prevented from using their properties for any other economically viable use. Nor have they shown that their properties have been rendered valueless and cannot be sold, nor even that they are prevented them from operating their office buildings at a profit. Thus, the complaint fails to state a claim for

an unconstitutional taking as a matter of law.

3. A Variance Process is Available.

Petitioners' claim fails for one final reason. Although they do not acknowledge it (Pet., passim), there is available a variance provision, Local Law No. 46 of 1988. N.Y.C. Admin. Code, §24-146.1(i) ante, pp. 15-16. Over $40,000,000.00 of the alleged loss in petitioners' complaint are lost "future" costs and lost "future" rents (A35-A36, ¶¶35-37, see Pet., p. 4, n.3). In light of this variance process, petitioners' challenge is premature as to all those claims and is not ripe for review. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). There, this Court reiterated that "a claim that the application of government regulations effects a taking of property interest is not ripe until the

government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 186. See also Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 294-295, 297 (1981); Agins v. Tiburon, 447 U.S. 255, 260-261 (1980); Willing v. Chicago Auditorium, 277 U.S. 274 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

In conclusion, given the individual inquiry necessary in takings analysis, this Court adheres to the principle that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." Pennell v. City of San Jose, supra, 485 U.S. at 9-10, 15. Thus, the instant case is not ripe for review.

For all the above reasons, the petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 23, 1990.

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